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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/004,823	12/07/2001	John R. Moody	2324 (GP-00-41)	7822
31743	7590	12/11/2009	EXAMINER	
Georgia-Pacific LLC			BUTLER, MICHAEL E	
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ATLANTA, GA 30303			ART UNIT	PAPER NUMBER
			3653	
			MAIL DATE	DELIVERY MODE
			12/11/2009	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN R. MOODY

Appeal 2008-005114
Application 10/004,823
Technology Center 3600

Decided: December 10, 2009

Before WILLIAM F. PATE, III, STEVEN D.A. McCARTHY, and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

John R. Moody (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of claims 1-10 and 21-22. Appellant canceled claims 11-20. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

The Invention

The claimed invention is to a gravity-feed towel dispenser; particularly, to the adapter plate that defines the dispensing aperture of the towel dispenser in order to alleviate dispensing problems. Spec. 1:10-13.

Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A modified gravity-feed towel dispenser for dispensing C-fold and interfolded towels, wherein said dispenser houses C-fold or interfolded towels having a transverse length, L, which are positioned to be dispensed through an elongated bottom dispensing aperture having a length of L or greater, said towel dispenser including means for defining a top portion, a front wall, a back wall and a pair of side walls of said towel dispenser, as well as a bottom portion collectively defining an interior for receiving a stack of C-fold or interfolded towels, said bottom portion of said towel dispenser defining said elongated bottom dispensing aperture, wherein an adapter plate is secured to said bottom portion of said towel dispenser and is configured to abridge the length of said dispensing aperture to a length L' of from about 80 percent to about 90 percent of said transverse length, L, of said C-fold or interfolded towels.

The Rejections

The following Examiner's rejections are before us for review:

Claims 1-10, 21, and 22 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention. For this rejection, the Examiner concludes that the term "about" as used to

qualify the transverse length of the dispensing aperture renders the claims indefinite. Ans. 4 and 6.

Claims 1-8, 21, and 22 stand rejected under 35 U.S.C. § 103(a) as being unpatentable given Gettelman, US 5,957,324, issued Sep. 28, 1999, in view of the BOBRICK 363 model towel dispenser as evidenced by the Examiner’s Affidavit, attested to on July 25, 2005. The Examiner concludes that “[i]t would have been obvious for the Gettelman et al. retrofit adapter to have dimensions selected from those used in the proven BOBRICK 363 towel dispenser because such dispenser has proven itself effective in minimizing multiple dispensed towels and fall through and come up with the instant invention.” Ans. 5.

Contentions

Appellant relies on case law and prior art cited by the Examiner for the position that, in this case, the term “about” is definite. *See* Reply Br. 4. Further, the Appellant contends that, in this case, the term “about” is definite because only when the prior art is very close and “it is not possible to characterize the differences between the prior art and the claimed subject matter due to the use of the term “about” that term is objectionable.” Reply Br. 5.

For the Examiner’s obviousness rejection, the Appellant contends, *inter alia*, that it is improper hindsight reconstruction of the Appellant’s claimed invention on the part of the Examiner to modify the adapter plate of Gettelman based on the evidence gathered from the BOBRICK model 363 towel dispenser as attested to by the Examiner in the Examiner’s Affidavit of July 25, 2005. *See* App. Br. 18 and Reply Br. 8.

SUMMARY OF DECISION

We AFFIRM.

OPINION

Issues

The issues before us are as follows:

Has Appellant shown the Examiner erred in concluding that, in this case, term “about” that qualifies the transverse length of the dispensing aperture renders the claims indefinite?

Has Appellant shown error in the Examiner’s rationale to combine the evidence gathered on the BOBRICK model 363 towel dispenser, which has a dispensing slot that is 95% of the length of its dispensing magazine, to the disclosure of Gettelman’s adapter plate within a towel dispenser in order to render obvious an adapter plate configured to abridge the length of the dispensing aperture that is less than the transverse length of a towel used in the dispenser?

Pertinent Facts

1. The Specification discloses a towel dispenser generally indicated at 10 with a dispensing aperture generally indicated at 24. The Specification further discloses that such towel dispensers include an adapter plate. Spec. 4: 10-21.
2. The Specification discloses that towels dispensed through the towel dispenser have a transverse length L. Spec. 5: 2-3.
3. The Specification discloses that, with respect to prior art towel dispensers, the transverse length of the aperture corresponds to the

transverse length of the dispensed towels, i.e., the transverse lengths are nearly identical. Spec. 5: 11-14.

4. The Specification discloses that the present invention shortens the transverse length of the dispensing aperture to a dimension that is from about 80% to about 90%, preferably about 85%, of the transverse length of the towels that are dispensed through the dispensing aperture. Spec. 5: 3-5 and 7: 10-11.
5. The Specification discloses that a multi-fold towel as shown in Figure 2 has a transverse length of 10.5 inches. Spec. 5: 6-8.
6. The Specification discloses if the dispensing length of the preferred embodiment was abridged to a length of about 85% of the transverse length of the multi-fold towel disclosed within the Specification, then the transverse length of the dispensing aperture would be nine inches. Spec. 7: 9-12.
7. Gettelman discloses that the transverse length of the slot 19 and the adapter 22 transverse across the full width of the towel dispenser, i.e., the transverse lengths are nearly identical. Gettelman, Figures 2 and 3.
8. As evidenced by the Examiner's Affidavit, the BOBRICK model 363 towel dispenser has a slot length of 10.5 inches and a dispensing magazine major axis length of 11 inches. Examiner's Affidavit, lines 7 and 8.

Principles of Law

When a word of degree is used, it is necessary to determine whether the Specification provides some standard for measuring that degree. *See*

Seattle Box Co. v. Indus. Crating & Packing, Inc., 731 F.2d 818, 826 (Fed. Cir. 1984) (“Definiteness problems often arise when words of degree are used in a claim . . . When a word of degree is used the district court must determine whether the patent’s specification provides some standard for measuring that degree.”)

The Federal Circuit has stated that for “rejections on obviousness grounds . . . there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). *See also KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

Analysis

Definiteness

Turning to the Examiner’s rejection of claims 1-10, 21, and 22 under the second paragraph of 35 U.S.C. § 112, we shall sustain this rejection. The Specification fails to sets forth any standard in measuring the degree of “about” as called for in the claimed range. *See* Facts 1-6. The Specification fails to set forth a tolerance for what percentage in the shortening of the transverse length of the dispensing aperture would fall within the particular claimed range. For instance, is the tolerance 10%, 5%, or 3%? In other words, would a shortening of the transverse length of the dispensing aperture to a percentage of 75% or 78% or 91% or 94% or 83% or 86% relative to the transverse length of the towel to be dispensed by the towel dispenser fall within the range claimed? Further, the Specification fails to set forth actual dimensions of the transverse length of the dispensing aperture of the present invention in order for a person skilled in the art to determine how close of a

percentage in the shortening of the transverse length of the dispensing aperture would fall within the particular claimed range when the claims are read in light of the Specification in order to determine whether a shortening of the transverse length of the dispensing aperture would infringe the claimed range. Neither does the Specification disclose any reason for deviating from the 80% to 90% range of length ratios so as to provide indirect evidence of the scope of the term “about.” Accordingly, we conclude as a matter of law that, in this case, the term “about,” as used to define the claimed ranges, renders the claims indefinite because a person having ordinary skill in the art would not understand what infringes the claimed range when the claimed range is read in light of the Specification.

Obviousness

Turning next to the Examiner’s rejection of claims 1-8, 21, and 22 under 35 U.S.C. § 103(a), given the prior art and the Examiner’s articulated reasoning for applying the difference in distance between the dispensing magazine to the dispensing aperture of the BOBRICK model 363 towel dispenser to the description of the adapter plate within Gettelman, we shall not sustain the Examiner’s rejection because the Examiner’s articulated reasoning fails to have a rational underpinning. Gettelman’s adapter plate extends the full width of the towel dispenser. Fact 7. While the dispensing aperture of the BOBRICK model 363 is shorter in transverse length than the magazine length of the dispenser itself, Fact 8, we do not see, nor has the Examiner cogently explained, why a person having ordinary skill in the art would shorten an adapter plate based on the dispensing aperture distance of a towel dispenser being less distance than the magazine length of the towel dispenser. This case is not seen as being an obvious combination of prior art

elements or simple substitution of one known element for another, leading to predictable results, or any other indicator of potential obviousness. Rather the extensive amount of modification needed to the adapter plate of Gettelman is suggested nowhere in the cited art, and is born from the use of impermissible hindsight reconstruction in view of Appellant's Specification. Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor. *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1551, 1553 (Fed.Cir.1983), *cert. denied*, 469 U.S. 851 (1984). The Examiner's obviousness rejection is ostensibly grounded on speculation, unfounded assumptions, or hindsight reconstruction, rather than rational underpinning factually supported by the record. Consequently, we cannot sustain the rejection.

CONCLUSIONS

Appellant has not shown the Examiner erred in concluding that, in this case, the term "about" that qualifies the transverse length of the dispensing aperture renders the claims indefinite.

Appellant has shown error in the Examiner's rationale to combine the evidence gathered on the BOBRICK model 363 towel dispenser that has a dispensing slot that is 95% of its length of the dispensing magazine to the disclosure of Gettelman's adapter plate within a towel dispenser in order to render obvious an adapter plate configured to abridge the length of the dispensing aperture that is less than the transverse length of a towel used in the dispenser.

Appeal 2008-005114
Application 10/004,823

DECISION

The Examiner's decision to reject claims 1-10, 21, and 22 as indefinite is affirmed.

The Examiner's decision to reject claims 1-8, 21, and 22 as obvious is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

Klh

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